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No. 91-795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COLLINS MUSIC COMPANY, and
COLLINS NOVELTY COMPANY, INC.,
Petitioners,

v.

SOUTH CAROLINA TAX COMMISSION
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the due process question presented by the taxpayer in its Petition properly reviewable by the United States Supreme Court where such due process issue was not raised in any administrative or judicial hearing below and was not ruled on by any administrative or judicial body?

2. Is the due process question presented by the taxpayer in its Petition properly reviewable by the United States Supreme Court where the sole issue decided by the South Carolina Supreme Court was decided on state law grounds, with such grounds being that 27 S.C. Code Ann. Regs. 117-110 (1976) did not exceed the limits on delegation of authority to the executive branch allowed under the South Carolina Constitution?

3. Where the evidence in the record supports a valuation method based on cost less depreciation with a minimum floor and where the value determined under Regulation 117-110 uses such a method, is a substantial federal question presented when the alleged violation is that the valuation is so irrational and arbitrary as to be in conflict with due process?

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STATEMENT OF THE CASE

This matter involves valuing merchant's equipment for property tax purposes. For the tax years 1982, 1983, and 1984, Collins owned numerous coin-operated devices, such as video game machines, pool tables, and jukeboxes. In filing its property tax returns, Collins omitted from its returns any coin-operated device which, while even though still owned by Collins, was no longer in use. The items omitted had been placed in storage. After an audit of Collins' records, the omitted devices were included for property tax purposes and valued at 10% of their original cost as required by 27 S.C. Code Ann. Regs. 117-110 (1976).

Collins disagreed with the audit results and challenged these findings in a hearing before the South Carolina Tax Commission. Collins argued first that Regulation 117-110 applied only to merchants' equipment actually used in a business, and that Collins' equipment was placed in storage and thus was not being used. Since there was no actual use, Collins argued Regulation 117-110 did not apply to it. Second, Collins argued that even if Regulation 117-110 did apply, the use of a value of 10% of the original cost was employing a method not allowed by statute. Thus, Collins argued Regulation 117-110 was invalid.

The South Carolina Tax Commission issued its Findings of Fact and Conclusions on June 2, 1988, in which it held the items placed in storage, even if not in use, were still reportable for property taxation and that Regulation 117-110 set a proper valuation method. On June 15, 1988, Collins filed with the Tax Board of Review an appeal of the South Carolina Tax Commission decision. Pursuant to S.C. Code Ann. Section 12-5-60 (1976) (see Apppendix B), the South Carolina Tax Commission filed with the Board the record made before the South Carolina Tax Commission. In accordance with S.C. Code Ann. Section 12-5-70 (1976) (see Appendix B), the Board

undertook its review of the record which consisted of Collins' appeal notice to the Board, the South Carolina Tax Commission's Findings of Fact and Conclusions, the Property Division's Exhibits 1 and 2, and a Transcript of the Testimony made before the South Carolina Tax Commission.

On August 3, 1989, the Board issued its Order. The Board held Collins' equipment was properly merchants' equipment subject to property taxation even when such was placed in storage. Finally, the Board held Regulation 117-110 invalid and directed the matter be remanded for the South Carolina Tax Commission to determine the value of the equipment.

On August 17, 1989, the South Carolina Tax Commission filed its Petition under S.C. Code Ann. Section 1-23-380 (1986) of the South Carolina Administrative Procedures Act for judicial review of the Board's decision that Regulation 117-110 was invalid. On September 15, 1989, Collins filed an Answer and Crossclaim to the Petition in which it alleged the Board erred in finding that equipment that was not actually in use was taxable as merchants' equipment.

The matter was heard by the South Carolina Circuit Court as a Petition to review an administrative decision (Petition for Writ, Appendix B, p. 6a.) and as such, the Court made its review based on the record as made before the South Carolina Tax Commission. The Petition filed by the Tax Commission asked the Court to overturn the Board's holding that Regulation 117-110 was invalid. On March 23, 1990, Judge Howell disagreed with the Tax Commission's view and issued an Order upholding the Board's conclusion that Regulation 117-110 was invalid.

An appeal to the South Carolina Supreme Court was made by the Tax Commission on March 30, 1990. On appeal, the taxpayer argued that the regulation was outside the statutory and constitutional authority under South Carolina's statutory law and under the South Carolina Constitution. (Taxpayer's

Respondent's Brief to the South Carolina Supreme Court, p. 10.) The South Carolina Supreme Court examined the statutory authority of S.C. Code Ann. Section 12-37-930 (Supp. 1990) and the South Carolina constitutional requirements of S.C. Const. art. III, Section 29; art. X, Section 1; and art. X, Section 3A and reversed the Lower Court by concluding that "... the Tax Commission has not exceeded its authority by promulgating Regulation 117-110, as it is within statutory and constitutional bounds." (Petition for Writ, Appendix A, p. 5a.) The taxpayer has now filed a Writ of Certiorari seeking the reversal of the South Carolina Supreme Court.

ARGUMENT I

THE PETITION SHOULD BE DENIED SINCE THE DUE PROCESS ISSUE WHICH THE TAXPAYER NOW SEEKS TO ASSERT WAS NOT RAISED NOR RULED UPON AT ANY LEVEL OF SOUTH CAROLINA'S ADMINISTRATIVE OR JUDICIAL HEARING PROCESS.

It is a well-settled principle that the Supreme Court has no jurisdiction to examine a final judgment of a state court where the record demonstrates the federal claim now being asserted was not presented in the state system. *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). Based on this principle, the Supreme Court should not grant review in the instant matter since the alleged federal claim, a supposed violation of due process, was never raised or ruled upon by any administrative or judicial forum in the state adjudication system. Such a conclusion is even more appropriate here where the entire South Carolina adjudication process was based upon the administrative record made before the South Carolina Tax Commission as required by Sections 12-5-60, 12-5-70, and 1-23-380(f). Nowhere in that administrative record or, for that matter, at any proceedings at any level of the state judicial system did the taxpayer assert application of Regulation 117-

110 created a violation of its rights to due process. A review of that record supports this position.

The issue the taxpayer seeks to assert is that application of Regulation 117-110 is a violation of due process as ". . . an irrational and arbitrary abuse of the Tax Commission's power . . ." (Petitioner's Writ at p. (i).) The record shows that no challenge under the due process clause was ever raised.

Rather than due process being an issue, the record is repleat with instances revealing that the only issue relating to Regulation 117-110 was the state law issue of whether the regulation exceeded the authority granted to the Tax Commission under South Carolina statutes and the South Carolina Constitution. In the transcript of the testimony before the Tax Commission, the taxpayer never asserts that Regulation 117-110 is so arbitrary and irrational as to be a violation of due process. Rather, the taxpayer's testimony states the issue is whether the ". . . regulation is in contravention of specific statutory language or the constitutional language found in Article 3 Section 29 [of the SC Constitution.]" (See Tr. of Record, pp. 78-79.) The decision of the Tax Commission did not find due process to be an issue. Rather, the Commission found that "[t]he taxpayer argues that the Division's use of Regulation 117-110 to value the subject property violates [Section 12-37-930] by producing a value that exceeds fair market value." (See Petitioner's Writ, p. 20a.) When the taxpayer appealed the Tax Commission's decision to the Tax Board of Review, the taxpayer's appeal notice made no mention of due process. The position on appeal to the Board, as stated by the taxpayer, was simply the state law issue that the ". . . regulation is invalid as violative of section 12-37-930 and the South Carolina Constitution,. . ." (See Tr. of Record, p. 23.)

Neither the Tax Board of Review, the Circuit Court, nor the South Carolina Supreme Court had a due process argument

presented or addressed. The Board, while it agreed with the taxpayer, did not do so on any grounds based on due process. Again the issue was one in which the Board held "[t]he regulation on its face exceeds the scope of authority specifically provided by the statute." (See Petition for Writ, p. 16a.) On appeal to the Circuit Court, the Court only addressed whether the regulation was valid within the authority given to the Tax Commission as limited by Section 12-37-930; art. III, Section 29; and art. X, Section 3A. The South Carolina Supreme Court, in upholding the validity of the regulation, did so by addressing the sole issue of whether the regulation was constitutional under the South Carolina Constitution.

Based on the record created in the administrative hearing before the Tax Commission and all subsequent hearings before the Board, the Circuit Court, and the South Carolina Supreme Court, no due process challenge was ever made. It is now improper for the taxpayer to attempt to raise an issue to this Court that was not addressed in the state system. Accordingly, this Court should deny the taxpayer's Petition.

ARGUMENT II

THE PETITION SHOULD BE DENIED SINCE THE HOLDING OF THE SOUTH CAROLINA SUPREME COURT (i.e., THE AUTHORITY OF THE TAX COMMISSION TO ESTABLISH VALUE UNDER REGULATION 117-110 DID NOT EXCEED THE LIMITS OF DELEGATION OF AUTHORITY TO THE EXECUTIVE BRANCH ALLOWED UNDER THE SOUTH CAROLINA CONSTITUTION) IS A HOLDING BASED SOLELY ON STATE GROUNDS AND IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

Argument I explains that the taxpayer did not raise a due process question at any level of the state system and thus no federal question having been raised in the state court, this Court should not grant the Petition. Argument II identifies the

issue addressed as being a pure state law issue and therefore presents a second valid reason for this Court's denial of the Petition.

It is well established that the Supreme Court will not review a decision of the state court where the state court decision rests upon an adequate and independent state ground. *Bell v. Maryland,* 378 U.S. 226 (1964); *Michigan v. Long,* 463 U.S. 1032 (1983). The taxpayer, in its Petition, states very clearly that in the state court ". . . the issue in controversy was that Regulation 117-110 exceeds the limits of the statutory foundation provided in section 12-37-930." (Petition for Writ, p. 12). This is a pure state law question dealing with the delegation of legislative power and one which is bottomed on an interpretation of art. III, Section 1, and art. I, Section 8 of the South Carolina Constitution.

Article III, Section 1, states in relevant part the following:

> The legislative power of this State shall be vested in . . . the General Assembly of the State of South Carolina.

In the same vein, art. I, Section 8, declares a separation of powers between the branches of state government:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of another.

The ability of an administrative agency to promulgate and to carry out regulations is always tempered by these two provisions of the South Carolina Constitution since "[i]t is well settled that . . . the Legislature may not delegate its power to make laws,. . ." *Heyward v. South Carolina Tax Commission,*

240 S.C. 347, 126 S.E.2d 15, 19 (1962). The issue which the state court must decide under these provisions of the state constitution is one of determining "[t]he degree of authority that may lawfully be delegated to an administrative agency . . ." *Terry v. Pratt*, 258 S.C. 177, 187 S.E.2d 884, 886 (1972). In some instances, the South Carolina Supreme Court has determined the lawful degree of delegated authority to an administrative agency has been exceeded. See *Heyward*, supra, and *Hay v. South Carolina Tax Commission*, 273 S.C. 269, 255 S.E.2d 837 (1979). On other occasions, the delegation of authority has been found proper. See *State ex rel Roddey v. Burns*, 219 S.C. 485, 66 S.E.2d 33 (1951); *Clarke v. South Carolina Public Service Authority*, 177 S.C. 427, 181 S.E. 481 (1935); *Terry v. Pratt*, supra.

In each of these cases, the issue was analyzed solely on state law grounds. The instant action is no different. The taxpayer at every level of South Carolina's adjudication process addressed the question as a state law issue. In the administrative hearing before the Tax Commission, the taxpayer's own testimony states the issue is whether the ". . . regulation is in contravention of specific statutory language or the constitutional language found in Article 3 Section 29 [of the SC Constitution.]" (See Tr. of Record, pp. 78-79.) The taxpayer's own statements in its appeal to the Tax Board of Review argues the state law issue that the ". . . regulation is invalid as violative of section 12-37-930 and the South Carolina Constitution,. . ." (See Tr. of Record, p. 23.) The Board addressed the state law issue of whether "[t]he regulation on its face exceeds the scope of authority specifically provided by the statute." (See Petition for Writ, p. 16a.) The Circuit Court addressed the state law issue of whether the regulation was valid and held ". . . Regulation 117-110 is invalid . . ." (See Petition for Writ, p. 13a.) The South Carolina Supreme Court concluded ". . . the Tax Commission has not exceeded its authority by promulgating Regulation 117-110,. . ." (Petitioner's Writ, p. 5a.)

The ability to delegate legislative authority to administrative agencies is a state law issue involving South Carolina's interpretation of its own Constitution. This issue has been resolved in the instant case on state law grounds and such ground is not a reviewable issue by this Court. Accordingly, the taxpayer's Petition should be denied.

ARGUMENT III

THE PETITION SHOULD BE DENIED SINCE ITS ALLEGATION (i.e., THE VALUATION OF THE TAXPAYER'S PROPERTY IS IRRATIONAL AND ARBITRARY) DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHERE, AS IN THE INSTANT CASE, THE EVIDENCE SUPPORTS THE METHOD OF VALUATION DETERMINED UNDER REGULATION 117-110.

The due process clause seeks only to prohibit purely arbitrary acts affecting property. *Southwestern Oil v. Texas*, 217 U.S. 114, 119 (1910). In fact, so long as the tax on property is not palpably arbitrary, the tax will be upheld. *Lawrence v. State Tax Commission of State of Mississippi*, 286 U.S. 276 (1932). Here, the tax is not arbitrary and the method of valuation employed by Regulation 117-110 is supported by the record as an acceptable method of valuation.

Section 12-37-930 employs a method of valuation based on what a willing buyer would pay a willing seller for the property under review. In complying with the standard of this section, Regulation 117-110 uses the original cost of the property less depreciation as shown for income tax purposes but no reduction for depreciation of more than 90%. Thus, there is a salvage value of 10% of the cost established. This method is a valid approach to valuation.

The use of cost is an appropriate means to value property under the willing buyer and willing seller standard since "...

the cost of an article is ordinarily some evidence of its value for tax purposes." *Belk Department Stores v. Taylor*, 259 S.C. 174, 191 S.E.2d 144, 146 (1972). Further, the use of a salvage value after depreciation is also reasonable since it must be assumed that as long as the owner decides to keep the property, it must have some minimum salvage value. As this Court has stated in a slightly different context, "... it is sound accounting practice annually to accrue ... an amount which at the time it is retired will with its salvage value replace the original investment therein." *Detroit Edison Co. v. Commissioner*, 319 U.S. 98, 101 (1943). Further, this Court has upheld the use of a salvage value to limit income tax deductions under earlier provisions of the Internal Revenue Code when the Court stated "... Congress intended that the taxpayer should, under the allowance for depreciation, recover only the cost of the asset less the estimated salvage, resale or second-hand value." *Massey Motors, Inc. v. United States*, 364 U.S. 92, 107 (1960). The Court reached this conclusion even thought it recognized the great "risk of error" in projecting the salvage value.

In a similar way, in the instant matter, the regulation merely attempts to account for the salvage value of a "vast array of items including such diverse items as typewriters, file cabinets, racks, desks, adding machines, storage shelves, and any other personal property that a merchant might have in a business." (Tax Commission's Appellant's Br., ftn 8, pp. 16 & 17.) Under such circumstances, the use of a salvage value cannot be said to be arbitrary.

Finally, the 10% salvage is not arbitrary since the record shows that as to the taxpayer's property, such is a reasonable valuation. The taxpayer's witness at the hearing before the Tax Commission was asked if the value of the taxpayer's property would be less than 10% of the cost. The witness responded that a 5% to 7% value "would probably be an average." (Tr. of Record before the South Carolina Supreme Court, p. 60.) The margin of error between 7% and 10% is not

so great as to be in violation of due process. Minor discrepancies or the fact that a more accurate system could be established is not a violation of due process. *Salomon v. State Tax Commission of New York*, 278 U.S. 484 (1929).

CONCLUSION

The taxpayer's Petition should be denied. The due process issue that the taxpayer now seeks to raise was never raised at any level in the state adjudication process, and accordingly, the federal question was never addressed in the state court. Likewise, there is no federal question for review since the only issue now in dispute is a pure state law issue of whether the Tax Commission exceeded its authority to promulgate regulations when it established Regulation 117-110. The scope of authority of an administrative agency to issue regulations is a question answered by interpreting the South Carolina Constitution as it relates to the separation of powers of the branches of government and the legislative powers of the General Assembly. Finally, even if the due process challenge is properly raised, such issue does not present a substantial federal question. The use of a cost method with a requirement for a salvage value is not arbitrary. Rather, such an approach is entirely reasonable when dealing with the large mass of merchants' property required to be valued.

Respectfully submitted,

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December 13, 1991

APPENDICES

APPENDIX A

Section 1-23-380 (a) and (f)

(a) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

APPENDIX B

Section 12-5-60

Within ten days after receipt by mail or otherwise of such notice of increase by the Commission, such person or representative of the county, municipality or tax district shall serve by mail or otherwise upon the chairman of the Commission a written notice of his intention to appeal to the board, together with the specific grounds upon which a reversal or modification of the action of the Commission is desired, and, upon such notice and grounds being served, the Commission shall transmit to the Board all papers, books and documents relating to the matters to be reviewed together with any statement the Commission may desire to make.

Section 12-5-70

Upon such notice, exceptions, records and statement the Board shall make its findings and may affirm, modify or reverse the action of the Commission. The appellant and the Commission shall be entitled to a hearing before the board in person or by such attorneys as the appellant and the Commission may employ.

APPENDIX C

Article III, Section 1

The legislative power of this State shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives", and both together the "General Assembly of the State of South Carolina."